

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WELLS ENTERPRISES, a California
corporation,

Plaintiff,

v.

WELLS BLOOMFIELD, LLC, a Delaware
limited liability company; WELLS
MANUFACTURING, a Division of Specialty
Equipment Co., Inc; SPECIALTY
EQUIPMENT COMPANIES, INC.; UNITED
TECHNOLOGIES CORPORATION;
CARRIER COMMERCIAL
REFRIGERATION, INC.; UNITED
TECHNOLOGIES REALTY, INC.; SOLAR
ACQUISITION CORP.; CARRIER
ACQUISITION CORP.; CARRIER
CORPORATION; DOES 1-25; ROES 1-25,
inclusive,

Defendants.

3:11-cv-00246-RCJ-VPC

ORDER

Currently before the Court are Defendants United Technologies Corporation, United Technologies Realty, Inc., Carrier Corporation, Carrier Commercial Refrigeration, Inc., and Wells Bloomfield, LLC's Motion for Partial Summary Judgment on Damages (#53) and Plaintiff Wells Enterprises' Motion for Partial Summary Judgment on Causation (#54).

BACKGROUND

Plaintiff Wells Enterprises leases commercial real estate. (Beckett Dep. Ex. 2, at 12 (#53-3).) One of the pieces of commercial real estate Wells Enterprises leases is property located at 2 Eric Circle, Verdi, Nevada (the "Property"). (Shannon Dep. Ex. 3, at 8 (#53-4).) Plaintiff Wells Enterprises has owned the Property for decades. The Property consists of

1 certain industrial buildings—buildings 1 through 4. (*Id.*)

2 On May 1, 1992, Plaintiff Wells Enterprises, as lessor, entered into a “Standard
3 Industrial Lease” (the “1992 Lease”) for the Property with Wells Manufacturing as Lessee.
4 (1992 Lease, Ex. 4 (#54-4).) Prior to the 1992 Lease, Wells Manufacturing had executed other
5 leases for the Property, including a 1987 lease addendum which extended a prior lease
6 through June 30, 1992. (Lease Addendum, Ex. 5 (#54-5).) The 1992 Lease included terms
7 setting forth obligations of Wells Manufacturing relating to the condition of the Property,
8 including sections requiring compliance with laws and prohibition against committing waste and
9 nuisance, accepting the Property “as-is,” keeping the Property in good repair, and surrendering
10 the Property in good condition. (1992 Lease, Ex. 4 (#54-4).)

11 Defendant Carrier Corporation, a wholly-owned subsidiary of Defendant United
12 Technologies Corporation, merged with or purchased the Wells Manufacturing business (and
13 its leasehold interest in the Property) in 2000. In 2001, the Wells Manufacturing business
14 became a division of Defendant Carrier Commercial Refrigeration, Inc. (“CCR”)¹, a subsidiary
15 of Carrier Corporation, called Wells Bloomfield. CCR executed a First Amendment to the 1992
16 Lease in July 2006 that extended the lease term until June 30, 2012. (First Amendment to
17 Lease, Ex. 5 (#53-8).) A Second Amendment executed the following year substituted
18 Defendant Wells Bloomfield, LLC as tenant and successor in interest to CCR and Wells
19 Manufacturing, followings its acquisition of the assets of the Wells Bloomfield division from
20 Defendant CCR. (Second Amendment to Lease, Ex. 5 (#53-8).) Defendant Wells Bloomfield,
21 LLC is an entity created by Middleby Corporation, an unrelated company that purchased the
22 assets of Wells Bloomfield from CCR. (Baron Dep. Ex. 4 at 35-36 (#53-5).)

23 There have been two incidents of contamination on the Property owned by Wells
24 Enterprises, both of which pre-date the 1992 Lease and only one of which is at issue in this
25 case. In one incident, not at issue in this case, contamination led to a February 12, 1991 order
26 from the Nevada Division of Environmental Protection. (*Id.* at 52-53 (#53-5).) According to the

27
28 ¹ Defendants CCR, Carrier Corporation, United Technologies Corporation and United Technologies Realty, Inc. shall be collectively referred to as the “Carrier Defendants.”

1 deposition of John Baron, the February 12, 1991 order discussed employee testimony
2 concerning Wells Manufacturing employees washing the floors with solvents, with the run-off
3 going into floor drains in the south septic system area. (*Id.*) This practice was later determined
4 to be the source of the contamination discovered in 2007, which is the contamination at issue
5 in this case. (*Id.* at 53.)

6 The contamination was discovered during the due diligence efforts conducted prior to
7 the sale of the assets of Wells Bloomfield to Middleby Corporation. (*Id.* at 19.) CCR retained
8 responsibility for any environmental losses associated with the Wells Manufacturing facility in
9 Verdi. (Wells Bloomfield Asset Purchase Agreement 1.4(k), Ex. 1 to Baron Dep. (#53-5).)
10 Following the discovery of contamination, the Carrier Defendants retained URS Group, Inc. as
11 an environmental consultant. (Baron Dep. Ex. 4, at 18 (#53-5).) The Carrier Defendants
12 secured a Phase I Environmental Site Assessment ("ESA"), which identified floor drains in the
13 south septic system area (south of Building 3) as possible sources of the contamination. (URS
14 Memorandum, Ex. 3 to Baron Dep. (#53-7).) Any contamination of the area occurred prior to
15 the execution of the 1992 Lease; in 1991, the floor drains were capped, a toilet removed, and
16 the south septic system area covered. (*Id.*)

17 In June 2007, the Carrier Defendants conducted a Phase II ESA. (*Id.*) Based on the
18 Phase II ESA and two additional investigations, the Carrier Defendants determined that the
19 contamination was confined to the south septic system area and its leach field. (*Id.*) The
20 Carrier Defendants prepared a proposal to remediate this localized contamination and the
21 Nevada Division of Environmental Protection approved the proposal, and a pilot test and
22 remediation efforts are currently ongoing. (Peterson Dep. Ex. 6, at 17 (#53-9).)

23 On November 24, 2010, Plaintiff Wells Enterprises filed a contamination action in the
24 Second Judicial District Court of the State of Nevada in and for the County of Washoe, Case
25 No. CV10-3532. Defendant Carrier Corporation was served on March 7, 2011. On April 6,
26 2011, Defendant Carrier Corporation, with the consent and joinder of the other defendants,
27 removed the case to federal court on the basis of diversity jurisdiction. The complaint (#1-2)
28 contains causes of action for (1) waste; (2) nuisance; (3) trespass; (4) breach of contract; (5)

1 anticipatory breach of contract; and (6) injunctive relief. Plaintiff requests actual damages and
2 treble damages under Nev. Rev. Stat. § 40.150, attorney's fees, costs, and interest. Plaintiff
3 also requests a permanent injunction mandating that the Defendants continue their
4 investigation and remediation of the Property, and to restore the Property to clean condition,
5 at Defendants' expense, by removal of the contaminants and/or pollution.

6 LEGAL STANDARD

7 Summary judgment allows courts to avoid unnecessary trials where no material factual
8 dispute exists. *N.W. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir.
9 1994). The court must view the evidence and the inferences arising therefrom in the light most
10 favorable to the nonmoving party, *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996), and
11 should award summary judgment where no genuine issues of material fact remain in dispute
12 and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).
13 Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis
14 for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable
15 minds could differ on the material facts at issue, however, summary judgment should not be
16 granted. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 516 U.S.
17 1171(1996).

18 The moving party bears the burden of informing the court of the basis for its motion,
19 together with evidence demonstrating the absence of any genuine issue of material fact.
20 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
21 the party opposing the motion may not rest upon mere allegations or denials in the pleadings,
22 but must set forth specific facts showing that there exists a genuine issue for trial. *Anderson*
23 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Although the parties may submit evidence
24 in an inadmissible form — namely, depositions, admissions, interrogatory answers, and
25 affidavits — only evidence which might be admissible at trial may be considered by a trial court
26 in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); *Beyene v. Coleman Sec.*
27 *Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

28 In deciding whether to grant summary judgment, a court must take three necessary

steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. *Anderson*, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). “As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. Disputes over irrelevant or unnecessary facts should not be considered. *Id.* Where there is a complete failure of proof on an essential element of the nonmoving party’s case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. *Id.*

DISCUSSION

A. Motion for Partial Summary Judgment on Damages (#53)

Defendants request partial summary judgment as to Plaintiff’s claim for damages. Defendants argue that Plaintiff’s request for damages in addition to injunctive relief in the form of an order directing Defendants to continue their investigation, remediation, and restoration of the premises at Defendants’ expense would result in a windfall to Plaintiff, and that a reward of damages would be contrary to prevailing law.

Under Nevada law, when an injury is done to property, the cost of restoring the property to its condition before the injury would be the proper measure of damages, unless there is total destruction of the property or the cost of restoration exceeds the value of the property. *Harvey v. Sides Silver Min. Co.*, 1 Nev. 539, 1865 WL 1089, at *2 (Nev. 1865). An award of damages separate from and in addition to remediation costs depends on whether the injury is permanent. *Spaulding v. Cameron*, 239 P.2d 625, 627-28 (Cal. 1952). In *Spaulding*, the court noted that when it is doubtful whether a nuisance is permanent or temporary, a plaintiff may elect to treat the nuisance as permanent or not. *Id.* at 628. The court found that a plaintiff cannot have both an injunction requiring corrective measures from a defendant and a finding

1 that the damage was permanent, as such a result would lead to a “double recovery if [a
2 plaintiff] could recover for the depreciation in value and also have the cause of the depreciation
3 removed.” *Id.* at 628-29. The court remanded the case to the trial court to determine whether
4 or not the nuisance is permanent; if permanent, damages were to be awarded in the decrease
5 in market value, if not permanent, injunctive relief and any additional damages for a temporary
6 decrease in value of the use of the property were to be awarded. *Id.* at 629.

7 Plaintiff argues that it is entitled to damages for the entire value of the Property because
8 Plaintiff’s expert testified at a deposition that in his opinion, the value of the Property as of
9 November 28, 2007 was zero. (Kilpatrick Dep. Ex. 8, at 48 (#53-11).) Dr. Kilpatrick, an estate
10 appraiser and financial economist, further testified that he has no opinion on whether the value
11 of zero would continue forever, and that he has no opinion as to what the value of the property
12 was on the date of his deposition, June 19, 2012, as he had not been asked to render that
13 opinion. (*Id.*) This valuation is the sum total of the evidence Plaintiff provides as proof of its
14 damages. Plaintiff appears to believe that because one or more Defendants have assumed
15 responsibility for contamination of the Property in certain contracts and in representations to
16 the Court, the burden of showing the amount of damages and proving the claims rests on
17 Defendants. Plaintiff claims that the measure of damages for permanent injury is the
18 difference between the market value prior to injury and the market value immediately following
19 the injury, but provides no evidence from which the Court or a jury may conclude that the injury
20 was in fact permanent. In response to the Motion for Partial Summary Judgment on Damages
21 (#53), Plaintiff provides a laundry list of alleged “facts” for which Plaintiff provides no citations,
22 and the rather blasé declaration that “Defendants’ failure to fully delineate the contamination
23 at the Property” and the uncertainty over when any remedial activity will conclude
24 “demonstrates that the harm to the Property is permanent under applicable law.” (Opp. at 10-
25 11 (#57).)

26 The “evidence” provided by Plaintiff is, as we noted, without any citation to the record.
27 That much of it is supported by the record is true; however, Plaintiff seems to have a basic
28 misunderstanding of how to respond to a motion for partial summary judgment. At this point

1 in the proceedings, discovery has closed and it is Plaintiff's burden to provide evidence, not
2 allegations. Furthermore, it is Plaintiff's burden to prove its amount of damages, not
3 Defendants'. Instead of responding to the salient points made in the motion for partial
4 summary judgment, Plaintiff chooses to make summary declarations that damages must be
5 permanent because remediation activity is ongoing and uncertain. Plaintiff does not appear
6 to understand that if it is electing to request damages for a permanent injury, it is Plaintiff's
7 burden to show that there was in fact a permanent injury, and to provide evidence of the
8 amount of damages. Plaintiff's evidence of damages is clearly deficient as it does not take into
9 account any subsequent remediation efforts while acknowledging that such efforts are being
10 undertaken at no cost to Plaintiff and may in fact prove to be successful. Plaintiff instead
11 claims that after remediation efforts began, contamination levels rose, a statement that
12 Defendants deftly show is misleading, as contamination levels had been rising at a rapid rate
13 prior to the pilot test and actually dropped after the pilot test injections were conducted. (Tarter
14 Dep. Ex. 1, at 86 (#60-1).)

15 Plaintiff makes further allegations disparaging the pilot test and remediation efforts as
16 merely experimental. While it is true that the effectiveness of the pilot test and subsequent
17 remediation efforts is yet to be determined, Plaintiff states that if the efforts are unsuccessful,
18 the Nevada Department of Environmental Protection will require Defendants to do conduct
19 other methods of remediation. In fact, Plaintiff's environmental expert testified that his opinion
20 is not that the site might never be remediated, but only that it has not been demonstrated
21 whether the current remediation efforts will be effective. (Imse Dep. Ex. 9, at 50-51 (#53-12).)

22 Under Nevada law, a plaintiff must prove the amount as well as the fact of damages by
23 substantial evidence. *Kelly Broadcasting Co., Inc. v. Sovereign Broadcast, Inc.*, 606 P.2d
24 1089, 1093 (Nev. 1980), *superseded by statute on other grounds*. Plaintiff has failed to carry
25 its burden to prove the fact and amount of damages. Plaintiff's only evidence of damages is
26 a valuation of the land at zero dollars as of November 2007. However, Plaintiff cannot dispute
27 and does not claim that it has had zero enjoyment of the land since that date. The land
28 continues to be leased out to one or more of the Defendants, and Plaintiff has not complained

1 of any loss of rental income as a result of the contamination. Defendants also provide
2 evidence that Plaintiff received offers to purchase the Property in amounts of close to or above
3 \$1,000,000. In short, a reasonable jury could not find that Plaintiff has proven that there was
4 a permanent injury to the land, as Plaintiff and its experts acknowledge that remediation efforts
5 are ongoing and may or may not be successful, and a reasonable jury could not find damages
6 based on any evidence provided by Plaintiff. Plaintiff's requested damages is not supported
7 by the evidence, and discovery is closed in this matter. For these reasons, the Court grants
8 Defendants' motion for partial summary judgment on damages, as awarding Plaintiffs the entire
9 value of the Property prior to the contamination, which is the only measure of damages Plaintiff
10 provides, would undoubtedly result in a windfall and is contradicted by the evidence showing
11 that the Property is not worthless to Plaintiff. Plaintiff has shown no evidence that any other
12 amount of damages would be appropriate, or that it has undertaken any investigation to fulfil
13 its burden of proving damages. While temporary damages may also be awarded while
14 remediation is ongoing, it is clear that Plaintiff has no evidence to show the amount of any
15 temporary damages.

16 **B. Motion for Partial Summary Judgment on Causation (#54)**

17 Plaintiff requests that we grant partial summary judgment on the element of causation,
18 a common element for many of Plaintiff's causes of action. Plaintiff contends that since Wells
19 Manufacturing used certain chemicals in its manufacturing operations and those chemicals
20 have contaminated the Property, summary judgment is appropriate to find all Defendants liable
21 for causing the contamination.

22 Plaintiff did not make any arguments in its Motion (#54) as to why the Carrier
23 Defendants should be liable for the conduct of Wells Manufacturing. While it is true that the
24 Carrier Defendants are variously parent corporations to Wells Manufacturing and/or to each
25 other and there may indeed be liability based on those relationships, Plaintiff has failed to
26 provide any evidence upon which the Court could find that such liability should be found as a
27 matter of law. In the reply (#66), Plaintiff makes the argument that parent corporations can be
28 held liable for the acts and omissions of their subsidiaries. However, due to other deficiencies

1 in Plaintiff's Motion (#54), discussed below, the Court finds it unnecessary to consider this
2 argument as a basis for granting summary judgment on the element of causation.

3 Plaintiff wholly fails at making the case that Wells Bloomfield, LLC should be liable for
4 causing the contamination to the Property. Defendant Wells Bloomfield, LLC is an unrelated
5 company to the Carrier Defendants, and its only connection to the contamination is through
6 an asset purchase agreement with the Carrier Defendants in which it was agreed that Wells
7 Bloomfield, LLC would not acquire any liabilities relating to the Verdi environmental losses.
8 Plaintiff makes the argument that because "Verdi Environmental Losses" under the purchase
9 agreement is defined as chlorinated solvent contamination, Wells Bloomfield, LLC is liable for
10 all other environmental issues on the Property. Plaintiff, however, fails to show why Defendant
11 Wells Bloomfield, LLC should be found to have caused the contamination, nuisance, or waste.

12 While the deficiencies noted above are glaring, Plaintiff's Motion (#54) for summary
13 judgment on causation as an element of breach of contract must be denied for an even more
14 essential reason. Plaintiff fails to show that there are no genuine issues of material fact
15 concerning causation. For example, Plaintiff claims that contamination of the Property
16 breached the 1992 Lease and therefore summary judgment is appropriate on the causation
17 element of breach of contract. Plaintiff does not, however, provide the Court with the actual
18 contract in force at the suspected time of contamination, which is undisputedly before 1992.
19 Plaintiff ignores this rather important point in responding to Defendants' opposition.

20 Plaintiff's request for summary judgment on causation as an element of its nuisance
21 also fails. To establish a claim for nuisance, Plaintiff must show that the alleged contamination
22 caused a substantial and unreasonable interference with the use and enjoyment of the land.
23 *Jezowski v. City of Reno*, 286 P.2d 257, 260 (Nev. 1955). Plaintiff argues that the "causation
24 element" of a nuisance claim has been shown by as a matter of law but does not actually
25 discuss the elements of a nuisance claim or show how the contamination affected its use and
26 enjoyment of the land. Indeed, Plaintiff does not argue that it suffered the loss of rental income
27 as a result of the contamination, and makes no effort to show what nuisance was caused by
28 the contamination other than to claim that the value of the property in 2007 was zero according

1 to its expert.

2 Finally, a claim of waste is “permanent or lasting injury” done to a plaintiff’s property.
3 *Price v. Ward*, 58 P. 849, 849 (Nev. 1899). Plaintiff is not entitled to summary judgment on
4 causation on the waste claim in the absence of any evidence showing permanent or lasting
5 injury.

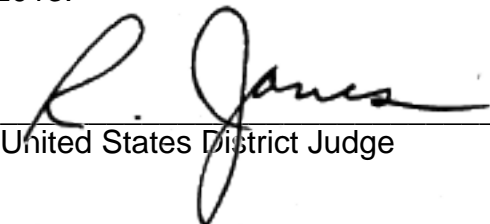
6 If Plaintiff’s Motion (#54) is to be read as a simple request for a finding as a matter of
7 law that Defendants caused the contamination, the Court finds that the motion must be denied.
8 Plaintiff has represented multiple times that “[t]he true source(s) are of [sic] the contamination
9 at the Property are unknown” and that there are questions remaining concerning how
10 contamination came to be located in certain areas. (Opp. at 7-8 (#57).) As long as such
11 questions remain, the Court finds that there are genuine issues of material fact concerning
12 causation, and summary judgment shall be denied.

13 CONCLUSION

14 For the foregoing reasons, IT IS ORDERED that the Motion for Partial Summary
15 Judgment on Damages (#53) is **GRANTED**.

16 IT IS FURTHER ORDERED that the Motion for Partial Summary Judgment on
17 Causation (#54) is **DENIED**.

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19 DATED: This 19th day of March, 2013.

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22 United States District Judge
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